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No. 89-924

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DAVID P. GOULD, *et al.*,

Petitioners,

v.

ALLECO INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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RESPONDENT ALLECO INC.'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in rejecting as untimely and not otherwise within the requirements of Rule 24(a), Fed. R. Civ. Pro., a last minute motion to intervene and block a settlement in a long-standing shareholder class action against a company (1) when the movants offered no adequate justification for their utterly untimely filing; and (2) when their only interest was the mere possibility that they might recover a judgment against the company on a complaint later dismissed by the district court.

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STATEMENT

1. *The Robinson Shareholder Litigation.* In July 1986, Leonard and Patricia Robinson filed a class action complaint against Alleco Inc. (then Allegheny Beverage Corporation) and five of its officers and directors, alleging violations of the federal securities laws and common law fraud and seeking damages on behalf of all persons who had purchased Alleco common stock between May 14, 1985, and June 30, 1986. App. 2324 (hereafter the "*Robinson* case").[1] After nearly two years of extensive discovery and other proceedings, the parties reached a settlement agreement providing for the payment of $6.95 million to the plaintiff class. On May 17, 1988, the district court gave preliminary approval to the agreement; certified the class for settlement purposes; ordered that all members of the class be notified; set a deadline of August 1, 1988, for class members to object to the proposed settlement; and scheduled a fairness hearing for September 6, 1988. Pet. App. B 5-6.

On August 1, 1988, petitioner Lawrence I. Weisman filed an "opposition" to the proposed settlement. Weisman, who did not purport to be a class member, claimed to be the owner of certain 9½ percent Alleco bonds and alleged that the proposed settlement would somehow violate the Indenture pursuant to which his bonds were issued. App. 2412. Two weeks later, on August 15, 1988, Weisman, acting as his own attorney, filed on behalf of himself and five others a complaint against Alleco and thirty-three individuals and entities. Pet. App. B 6-7 (hereafter the "*Gould*" case).

2. *The Robinson Settlement Hearing.* On the morning of September 6, 1988, only minutes before the settlement

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[1] "App." refers to the Joint Appendix in the court of appeals.

hearing in *Robinson*, Weisman and two other plaintiffs in *Gould* (Marks, Inc. and Patrick L. Day), filed a motion to intervene in the *Robinson* lawsuit. Pet. App. B 7.[2] Their motion incorporated their amended *Gould* complaint by reference and argued that they had an interest in the *Robinson* case because the proposed settlement would decrease the funds available to them if they ultimately prevailed in their lawsuit against Alleco.

Counsel for the movants claimed that Weisman was seeking to intervene in his capacity as an Alleco bondholder and a plaintiff in *Gould*, while his two co-movants (Marks and Day) were appearing as Alleco shareholders and plaintiffs in *Gould*. App. 2659. With respect to the shareholder movants, counsel at first seemed to concede that they were members of the class certified in the *Robinson* case. App. 2664. (Although all class members had received notice, none had lodged an objection to the proposed settlement.) Counsel later told the court that he was not certain whether Marks and Day were members of the *Robinson* class because he did not know when they purchased their shares. App. 2674.[3] Weisman, he said, was in any event in a different position because he was not a shareholder and sought to intervene in his capacity as an Alleco bondholder. Upon the district court's inquiry, however, he could not explain why the bondholders' Trustee had not appeared if the proposed *Robinson* settlement was, as Weisman alleged, against the bondholders' interests. App. 2667.

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[2] At the same time, Weisman served an amended complaint in *Gould*. *Id.*

[3] He agreed that the class alleged in *Gould* was the same as that certified in *Robinson* and that there could not be two identical classes at the same time. App. 2664.

As to the basis for intervention, movants' counsel admitted that he did not "know most of the underlying facts" (App. 2661). He nevertheless requested the court to grant intervention and cancel the *Robinson* settlement hearing in order to permit the movants to "demonstrate that their claims [in *Gould*] are sufficiently substantial" (App. 2710, 2716-17) and to give them an opportunity to provide the court with authority for their intervention (App. 2666), which counsel was unable to do at the hearing because he had not read the cases that supposedly supported their position. App. 2666.

3. *The Decision of the District Court.* The district court denied the motion to intervene. The court ruled that the motion was "utterly untimely" under Rule 24(a)(2), Fed. R. Civ. Pro., and would "not be tolerated." App. 2678-79. The hearing had been set for months and the court found that Weisman knew this full well. App. 2678-79. Yet the motion to intervene was not filed until the morning of the hearing and even then the movants had made no "strong showing either of likelihood of success in bringing about disapproval of the proposed settlement or of any recognized harm that the law will protect being invaded by the proposed settlement." App. 2678.

In the alternative, the court ruled that a contingent interest in some future recovery against Alleco—the only ground asserted in support of intervention—was insufficient for intervention as of right. App. 2677-82. Movants' counsel had failed to cite any authority in support of an opposite conclusion and the court rejected counsel's claim that he needed more time to research the law. App. 2679-80.

With respect to the objection Weisman had filed on August 1, 1988, the court held that he was not a member

of the *Robinson* class and therefore did not come within the terms of Rule 23(e), which applies only to class members.

4. *The Decision of the Court of Appeals.* The court of appeals affirmed. The court held that under Rule 24, intervention motions must be timely filed and that the motion here did not comply with that requirement. Pet. App. B 19. The court considered how far the *Robinson* case had progressed when the motion was filed, the prejudice to the parties and the reason for the "tardiness in moving to intervene." *Id. Robinson* had involved "[t]wo years of extensive litigation and settlement negotiations [which] culminated in the settlement proposal presented to the court on May 17, 1988." Pet. App. B 20. But the motion to intervene was not filed until "[t]hree and one-half months later, at the last possible moment . . ." *Id.* In addition, the effect of intervention and the consequent delay in approval of the settlement would have reduced the value of the fund available to the class members. Pet. App. B 23. Finally, the movants had no justifiable excuse for delaying their intervention until the morning of the hearing. Pet. App. B 24.

Apart from petitioners' failure to satisfy Rule 24's timeliness requirement, petitioners had not demonstrated an adequate interest to permit them to intervene as of right. They had merely claimed "a general interest in Alleco's assets based on a speculative recovery in an unrelated civil action" (Pet. App. B 17).

With respect to Weisman's "objection" to the settlement, the court of appeals held that as a non-member of the settling class Weisman was not within the terms of Rule 23(e), which "clearly contemplates allowing only class members to object to settlement proposals." Pet.

App. B 10. If non-class members wish to protest, they must file timely and proper motions to intervene. Pet. App. B 11. "[N]on-class members have no standing to object, pursuant to a Rule 23(e) notice directed to class members, to a proposed class settlement." *Id.*

5. *Proceedings in the Gould Case.* On September 19, 1988, the district court granted defendant's motion to dismiss the *Gould* complaint on the ground that it violated Rule 8(a), Fed. R. Civ. Pro. Pet. App. B 8 n.2. Alleco then moved for sanctions and injunctive relief against Weisman because he had served as an attorney for the company and its chief executive officer during the period encompassed in the *Gould* complaint, because in the *Gould* complaint he falsely declared under oath that he had not had such an attorney-client relationship, and because the complaint alleged matters within that relationship. App. 2166.

After an evidentiary hearing on February 27, 1989, while this case was awaiting decision by the court of appeals, the district court found that Weisman's misconduct as an attorney had been egregious, that his complaint in *Gould* was falsely sworn and that he had engaged in bad faith in bringing the *Gould* action. The district court dismissed Weisman as a plaintiff in *Gould* with prejudice and enjoined him from using or disclosing information within the attorney-client relationship. Order of Feb. 28, 1989, No. S 88-2399 (D. Md.). With respect to the other plaintiffs in *Gould*, the court dismissed their complaint without prejudice and placed restrictions on their use of any information disclosed to them by Weisman in connection with the *Gould* complaint. *Id.*

Weisman appealed from the court's Rule 11 judgment against him. The other *Gould* plaintiffs, including Marks and Day, did not appeal; with respect to them, the district

court's judgment dismissing their complaint therefore became final.

ARGUMENT

The decision below does not warrant review. No recurring issue is presented. No question of general importance has been raised. The judgment does not create any conflict among the courts of appeals. The decision rested "on the facts of this case" (Pet. App. B 15) and the court of appeals correctly applied settled law to those facts in ruling that the district court had not abused its discretion in rejecting petitioners' motion to intervene. Still other considerations render the case even less worthy of further consideration.

1. Of the three parties who sought to intervene for the purpose of blocking the settlement in *Robinson*, two are no longer in any position to raise questions regarding the decision below. Marks, Inc. and Patrick L. Day moved to intervene on the ground that payment of the settlement might impair their ability to collect any future judgment they might recover on their complaint in *Gould* (Pet. App. B 17; App. 2709-10). However, as set forth above, the district court later dismissed the *Gould* complaint, neither Marks nor Day appealed from the district court's judgment against them (*see Torres* v. *Oakland Scavenger Co.*, 108 S. Ct. 2405 (1988)), and they have no outstanding complaint against Alleco.

2. With respect to the remaining party—Lawrence I. Weisman, the district court also later dismissed, with prejudice, his complaint in *Gould* as a sanction for Weisman's false declaration under oath and his violation of Rule 11, Fed. R. Civ. Pro. Unlike Marks and Day, however, Weisman has appealed from this judgment. His appeal is currently pending. If Weisman loses that appeal, the questions he presents here will also become moot

because, like his co-movants, his intervention motion rested on his status as a plaintiff in *Gould*.

3. Weisman, who claims to be a bondholder, purports to be acting on behalf of a class of "bondholders" (*e.g.*, Pet. 7, 9, 14). That is not accurate. The intervention motion was not filed as a class action and no such class was ever certified.

Moreover, Weisman was barred by the "no action" clause in the Indenture not only from acting on behalf of other bondholders, but also from instituting any legal action to enforce his alleged rights as a bondholder. The Indenture provides that the Trustee has the duty to bring suits to protect the bondholders' interests; only if the Trustee refuses to do so, upon the request of the holders of 25 percent or more of the outstanding bonds, can those individual bondholders institute legal proceedings. App. 2424-25; Pet. App. D 47-48. Here neither the Trustee nor the holders of 25 percent of the bonds sought to intervene in the *Robinson* case.

Without more, the fact that the Indenture barred Weisman from bringing the *Gould* suit and from seeking to intervene in the *Robinson* case in his capacity as a bondholder disposes of his contentions in this Court. Although this issue, which is governed by state law, was raised below (App. 2424-25; Br. of Defendants-Appellees, at p. 21)), the court of appeals ruled against Weisman without having to reach it.[4]

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[4] Invoking Maryland corporate law, the federal bankruptcy code, unidentified Indenture provisions, and decisions concerning other subjects, petitioners seek to create the impression that bondholders such as Weisman had to look to Alleco alone for payment of the interest and principal on their bonds and that Weisman should have been permitted to intervene because the settlement in *Robinson*

4. The first two questions presented (Pet. i) are directed to the ruling of the court of appeals that petitioners, in moving to intervene, failed to satisfy the requirements of Rule 24(a).[5] As we have indicated, the questions are fact-intensive and involve no unsettled legal principles about which the courts of appeals are in disagreement. For those reasons alone, further review is unwarranted.

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prevented Alleco from meeting these obligations. Pet. 26. Apart from the fact that petitioners did not raise these arguments in the district court, they are not accurate.

Alleco sold its assets in December 1987 to Service America Corporation, which assumed all the obligations under the Indenture and has since made all interest payments on the bonds and has otherwise fully complied with the terms of the Indenture. *See Sharon Steel Corp.* v. *Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1051 (2d Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983) (recognizing the importance of successor obligor provisions in indentures allowing companies such as Alleco "to liquidate their operating assets and enter a new field free from public debt"). It is true that a federal district court in Minnesota ruled in August 1989 that a technical breach of the Indenture occurred (Pet. App. D 1), but that decision in favor of the Trustee has no bearing whatever on the question whether Weisman's intervention motion should have been granted a year earlier, in September 1988. In any event, the Minnesota court's decision has been appealed.

Weisman also suggests that as a bondholder, he was entitled to block the tender offer, merger and dissolution of Alleco (Pet. 16, 31). How that relates to his intervention motion in the *Robinson* case he does not explain. In any event, he neglects to point out that the Trustee, on behalf of *all* bondholders, sought a preliminary injunction to stop these transactions and the Minnesota district court denied it. Pet. App. D 11-12.

[5] The remaining two questions are directed at the alleged terms of the *Robinson* settlement. Pet. i-ii. Because petitioners' motion to intervene was properly denied, the court of appeals did not reach these questions and we do not discuss them in this opposition.

In any event, the court of appeals correctly held that the motion to intervene was "outside even the most indulgent standard of timeliness" and was therefore properly denied for that reason (Pet. App. B 18-25). The *Robinson* litigation had been going on for years. The September 6, 1988, hearing on the proposed settlement had been scheduled months ahead of time. As the district court found, Weisman knew of the upcoming hearing in the *Robinson* case well in advance, but chose to file his motion to intervene at the last possible moment, only minutes before the hearing commenced. Pet. App. B 5, B 7.

His sole excuse for this utter disregard of the orderly procedure mandated by the district court was that he had been ill. But as the court of appeals held, the district court properly rejected that excuse, which was belied by the fact that throughout the month before the hearing, Weisman had been inundating the court with massive pleadings in his role as an attorney for himself and other other plaintiffs in *Gould*. Pet. App. B 24. Moreover, Weisman was represented by counsel and his alleged personal medical problems, which were never substantiated at the hearing, did not incapacitate his numerous attorneys. *Id.*

In light of these and other circumstances (Pet. App. B 19-B 23), the district court properly denied the intervention motion. "Timeliness is to be determined from all the circumstances" and "the court's ruling will not be disturbed on review" unless there has been an abuse of discretion. *NAACP* v. *New York*, 413 U.S. 345, 366 (1973); *see* Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv. 721, 759 (1968). The court of appeals correctly applied these settled principles and its decision presents no issue worthy of further consideration.

5. As an independent ground for sustaining the district court's denial of intervention, the court of appeals correctly ruled that the petitioners had not satisfied Rule 24(a)(2)'s requirement that the applicant demonstrate a sufficient interest in the action.[6] Petitioners merely claimed that if they were ultimately successful in their action in *Gould* (which they were not), payment of the settlement in *Robinson* would leave less money for them. Pet. App. B 17. But if that were a sufficient basis for intervention as of right under Rule 24, "every proposed settlement would be subject to derailment as long as a potential judgment creditor decided to intervene." Pet. App. B 17. *See, e.g., Hawaii-Pacific Venture Capital Corp.* v. *Rothbard*, 564 F.2d 1343, 1346 (9th Cir. 1977); *Kusner* v. *First Pennsylvania Corp.*, 74 F.R.D. 606, 609-11 (E.D. Pa. 1977), *affirmed*, 577 F.2d 726 (3d Cir. 1978).[7] Accordingly, the district "court did not abuse its

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[6] Weisman does not contend that he was a member of the class entitled to notice and an opportunity to be heard regarding the settlement under Rule 23(e). His claim instead is that Rule 24(a) applies to fairness hearings on settlements in class actions (Pet. 18), a point about which the court of appeals agreed. The decision below turned, as we have discussed, on petitioners' failure to satisfy the requirements of Rule 24.

[7] *Securities and Exchange Comm'n* v. *Flight Transp. Corp.*, 699 F.2d 943 (8th Cir. 1983), which petitioners cite, is not to the contrary. The decision turned on its peculiar facts. The court of appeals recognized that generally potential creditors must bring their own actions and cannot intervene in an action brought by another creditor. 699 F.2d at 947. The court of appeals ruled, however, that a potential creditor of Flight Transportation should have been allowed to intervene because the district court had issued an injunction in the case preventing it from prosecuting its own, independent action against the company. 699 F.2d at 947-948. No such injunction had been issued here. Petitioners were free to prosecute their *Gould* complaint and did so—unsuccessfully. These and other factors set forth in the text fully supported the district court's denial of intervention.

discretion by ruling that the intervenors had an insufficient interest for Rule 24(a) purposes." Pet. App. B 18.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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